

STATE OF MICHIGAN
COURT OF APPEALS

PAUL S. LESNAU,

Plaintiff-Appellant/
Cross-Appellee,

v

CITY OF WARREN,

Defendant-Appellee/
Cross-Appellant.

UNPUBLISHED

July 25, 1997

No. 186729

Macomb Circuit Court

LC No. 93-002470-CZ

Before: Hood, P.J., and McDonald and Young, JJ.

PER CURIAM.

Plaintiff appeals as of right, following a bench trial, from the judgment dismissing his declaratory judgment action and finding in favor of defendant. Defendant cross-appeals by leave granted. We affirm.

During most of the events relating to plaintiff's lawsuit, defendant was engaged in federal court litigation over minority hiring, and its civil service eligibility lists were subject to question. A brief rendition of the pertinent facts to this appeal follows.

On September 11, 1989, defendant published a notice and accepted applications for the position of firefighter. On April 9, 1990, the first eligibility list (effective 1990 to 1992) was established, and plaintiff placed 13th on that list. On April 16, 1990, the top ten scorers were hired from the 1990-1992 list.

On October 11, 1990, plaintiff was informed that the 1990-1992 eligibility list was "thrown out" because of errors made by the police and fire civil service commission, and that he was to resubmit an application. On October 15, 1990, plaintiff resubmitted his application, but did not investigate the nature and kind of errors that caused the eligibility list to be "thrown out." On October 22, 1990, a second firefighter eligibility list (effective 1991 to 1993) was created. Plaintiff was ranked 7th on the second list.

On November 9, 1990, applicant Steven Sitek, who received the same October 11, 1990 letter, filed a complaint for a declaratory judgment, alleging that individuals wrongfully hired because they were erroneously awarded preference points should be immediately removed from employment and that Sitek and "others similarly qualified" should be hired immediately. On the first eligibility list, plaintiff was ranked immediately after Sitek. Plaintiff was aware of Sitek's lawsuit immediately after it was filed. In fact, plaintiff discussed with Sitek the possibility of having a joint case. Plaintiff also attended two or three court proceedings in the Sitek case, and spoke with Sitek's attorney.

On May 6, 1991, plaintiff and Sitek were hired as firefighters from the 1991-1993 eligibility list. Plaintiff was on probation until November 6, 1991, at which time he became eligible to file a grievance with the Union pursuant to the collective bargaining agreement.

On November 19, 1991, Sitek and defendant entered into a settlement agreement. On February 25, 1992, a consent judgment was entered in Sitek's case, which provided that Sitek's seniority day for hiring, promotions, demotions, layoff, retirement and all other purposes shall be modified to October 11, 1990 (the date that notification of errors on the 1990 was sent to Sitek and plaintiff). Sitek's consent judgment specifically stated that it was not to have precedential effect.

In early January 1993, a revised rank order for the firefighters hired in April 1990 was posted in each fire station, showing changes in seniority because of the recomputation of the preference points. On February 26, 1993, plaintiff wrote the Union a letter requesting their assistance. On April 30, 1993, the Union informed plaintiff that it would not pursue the grievance because it was untimely. The Union indicated that the parties' collective bargaining agreement requires an employee's complaint to be filed within ten days "of the incident giving rise to the grievance or knowledge of its occurrence." As such, if plaintiff had a valid claim, it was incumbent on him to bring it to the attention of the Union "as soon as he became aware of it or, at the very latest, as soon as he became eligible to file a grievance, i.e., immediately after completing his probationary period."

On May 18, 1993, plaintiff filed the instant lawsuit, seeking a declaratory judgment compelling defendant to adjust plaintiff's seniority status as a firefighter and give plaintiff the pay raises and back-pay commensurate with the increased seniority. Plaintiff claimed that he should have been hired a year earlier, based on the 1990-1992 eligibility list. The trial court found, in part, that plaintiff "simply waited too long to pursue his claim."

We reject plaintiff's claim that the trial court erred in ruling that plaintiff waited too long to assert his claim for increased seniority status. *Public Heath Dep't v Rivergate Manor*, 452 Mich 495, 507; 550 NW2d 515 (1996). Specifically, plaintiff contends that he did not realize until January 1993, when the revised rank order for fire fighters hired in April of 1990 was posted, that he should have been one of the top ten on the 1990 eligibility list. Contrary to plaintiff's claims, the evidence clearly established that plaintiff was aware that he had a grievance well before 1993. For example, plaintiff was aware of Sitek's lawsuit concerning the errors on the 1990 list immediately after it was filed in late 1990, and that Sitek was seeking an adjustment in seniority and back-pay. In fact, plaintiff considered inclusion in Sitek's lawsuit. Even after Sitek received his consent judgment in February 1992, plaintiff took no action until over a year later. Plaintiff

simply was not diligent in protecting his own rights. See *Burlage v Radio Cab Co*, 321 Mich 319, 325; 32 NW2d 465 (1948). Accordingly, the trial court did not err in dismissing plaintiff's case and finding for defendant on this basis.

We agree with plaintiff's argument, however, that the trial court erred in finding that an adjustment to plaintiff's seniority would be an alteration or amendment of the 1990-1992 list. *Day v Gerds*, 54 Mich App 547, 550-553; 221 NW2d 221 (1974). As in the case of the nine firefighters whose seniority and rank were revised after the intended life of the 1990-1992 list had expired, an adjustment in plaintiff's seniority is not an alteration of the eligibility list. Rather, an adjustment merely serves to correct errors in the ranking of the fire fighters on that list. The record demonstrates that plaintiff and the fire fighters who were hired off the 1990 list were all applicants when the miscalculations were made with no guarantee other than consideration for permanent employment. *Arsenault v Mayor of Taylor*, 98 Mich App 767, 770; 296 NW2d 351 (1980). We also find that the trial court erred in its determination that defendant's defense of "impossibility" has merit. *Bissell v L W Edison Co*, 9 Mich App 276, 285; 156 NW2d 623 (1967). Nevertheless, the court's errors are harmless because plaintiff's grievance was untimely.

We further find that, contrary to plaintiff's claims, the trial court did not err in finding that plaintiff had a remedy at law and that plaintiff failed to exhaust his administrative remedies by failing to timely file his grievance. There was sufficient evidence presented to show that plaintiff was aggrieved by the errors on the 1990 list. There was no evidence to show that the Union would not have pursued a timely grievance, particularly in light of the fact that it had worked with defendant to adjust the seniority of the nine firefighters who were hired off the 1990-1992 list.

This Court finds no compelling reason to address defendant's issue of whether there can be a cause of action as to an eligibility list which has expired--an issue of first impression in Michigan. Defendant did not raise the issue before the trial court and, thus, this issue was not preserved for appeal. *Ali v Detroit*, 218 Mich App 581, 587; 554 NW2d 384 (1996). Moreover, defendant waived the right to raise this issue by its actions in January 1993, when it adjusted the seniority of those fire fighters hired from the 1990-1992 list.

We also need not address defendant's issue of whether plaintiff was required to claim the union breached its duty of fair representation because it was not preserved for appeal. *Federated Publications, Inc v Board of Trustees of Michigan State University*, 221 Mich App 103, 119; 561 NW2d 433 (1997); *Knoke v East Jackson School Dist*, 201 Mich App 480, 485; 506 NW2d 878 (1993).

Affirmed.

/s/ Harold Hood
/s/ Gary R. McDonald
/s/ Robert P. Young, Jr.